

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID WILLIAM TREMUTH,

Defendant-Appellant.

UNPUBLISHED

August 3, 1999

No. 210386

Livingston Circuit Court

LC No. 97-010197 FH

Before: White, P.J., and Markey and Wilder, JJ.

PER CURIAM.

Defendant appeals by right his convictions of first-degree retail fraud, MCL 750.356c; MSA 28.588(3), and of being a third habitual offender, MCL 769.11; MSA 28.1083, entered after a jury trial. We affirm.

Defendant was charged with second-degree retail fraud, MCL 750.356d; MSA 28.588(4), in connection with the theft of groceries from the V.G. Food Center. Richard Thomas, a pharmacist, saw defendant push a cart filled with groceries out of the store without stopping to pay for the items. Both Thomas and Jim Redumski, the store manager, observed defendant loading the items into his vehicle in the store parking lot. When confronted, defendant abandoned the cart containing the remaining items and drove off the premises. Thomas noted the vehicle's license number, and police apprehended defendant.

Defendant requested that the jury be instructed on the offense of attempted second-degree retail fraud. The court denied defendant's request.

The jury found defendant guilty as charged. The parties agreed that because defendant had previously been convicted of retail fraud, he was guilty of first-degree retail fraud pursuant to MCL 750.356c(2); MSA 28.588(3)(2). *People v Justice*, 216 Mich App 633, 634-635; 550 NW2d 562 (1996). The court sentenced defendant as an habitual offender to serve eighteen months to four years in prison.

To establish that defendant was guilty of the charged offense of second-degree retail fraud regarding theft of groceries from the store, the prosecution was required to prove: (1) that defendant took property that the store offered for sale; (2) that defendant moved the property; (3) that defendant intended to steal the property; and (4) that the incident happened either inside the store or in the immediate area around the store, at a time when the store was open to the public. MCL 750.356d(1)(b); MSA 28.588(4)(1)(b);¹ see CJI2d 23.13; *People v Eilola*, 179 Mich App 315, 318-319; 445 NW2d 490 (1989).

We review jury instructions in their entirety to determine if reversal is required. The failure to give a requested instruction constitutes reversible error only if the requested instruction (1) is substantially correct, (2) was not sufficiently covered in the charge given to the jury, and (3) concerned an important point in the trial so that the failure to give the instruction seriously impaired the defendant's ability to present a defense. *People v Moldenhauer*, 210 Mich App 158, 159-160; 533 NW2d 9 (1995).

In the case at bar, the evidence produced at trial showed that defendant took property offered by the store for sale and moved the property out of the store without paying for it. This was sufficient to movement of the property. Defendant's intent to steal the property, i.e., to take it from the store permanently without the store's consent, could be inferred from his act of loading a portion of the property into his vehicle. See, e.g., *People v Beaudin*, 417 Mich 570, 575; 339 NW2d 461 (1983). The incident took place inside and in the immediate area around the store at a time when the store was open to the public. Thus, the evidence supported a finding that defendant committed the completed offense of second-degree retail fraud.

Notably, an attempt is a cognate rather than a necessarily included lesser offense. Unless the evidence shows that only an attempt was committed, the court should not instruct on attempt. *People v Adams*, 416 Mich 53, 56-57; 330 NW2d 634 (1982). Here, because the evidence showed that only the completed offense was committed, the giving of an attempt instruction would not have been substantially correct. *Moldenhauer, supra*. Defendant was therefore properly convicted of second-degree retail fraud and properly deemed guilty of first-degree retail fraud pursuant to MCL 750.356c(2); MSA 28.588(3)(2). *People v Johnson*, 195 Mich App 571, 572, 575; 491 NW2d 622 (1992).

We affirm.

/s/ Helene N. White

/s/ Jane E. Markey

/s/ Kurtis T. Wilder

¹ Both the first and second-degree retail fraud statutes were amended by 1998 PA 311 and applies to offenses committed on or after January 1, 1999. Because defendant was convicted prior to 1999, the former statute applies.